

1 JUDGE CHACHKIN: Well, you better check with  
2 the court reporter and find out whether the depositions  
3 have been sent.

4 MR. LYON: Let me note, Your Honor, that  
5 yesterday at about 3:00 o'clock was the first time that  
6 I knew that there was a problem in the depositions  
7 having not been filed with the Secretary or the  
8 witnesses apparently having not been given their fees  
9 for this.

10 I would note that Mr. Maia was given a plane  
11 ticket and was put up in a hotel in Los Angeles. So  
12 the suggestion that only a pittance of the fees and  
13 expenses have been paid is somewhat misleading. With  
14 respect to Ms. McElwaine and Mr. Morse, I don't know  
15 what Mr. Barab did. I assumed that he -- I had assumed  
16 since I hadn't heard anything to the contrary until  
17 yesterday that the witnesses had been given their fees.  
18 But I think that that's a matter that is a little bit  
19 afield from the matter that we were discussing.

20 JUDGE CHACHKIN: The only thing I'm concerned  
21 about is whether the depositions were given to the  
22 witnesses so they can review the depositions so they  
23 could be filed.

24 MR. FITZGIBBON: Okay. The only information  
25 that I have is that Chris McElwaine was deposed twice.

1 She was deposed on August 4th and she received that  
2 deposition and she sent it back in late August. Yet  
3 that one to date has not been filed with the  
4 Commission's Secretary.

5 Ms. McElwaine received her second deposition  
6 which was taken on August 31st yesterday and she's  
7 reviewing it now.

8 MR. LYON: I haven't even received that other  
9 than some pages that were faxed to me late yesterday  
10 evening.

11 JUDGE CHACKIN: Well, all I can say is  
12 Mr. Lyon knows that it's necessary to file with the  
13 Commission and I'm sure he's going to take the  
14 necessary steps to do so as soon as the documents are  
15 signed. Apparently the first deposition of  
16 Ms. McElwaine has been signed and that can be filed  
17 with the Commission.

18 MR. LYON: I assume so. Your Honor should  
19 know that I did not participate in those depositions.  
20 Mr. Barab took them in Los Angeles. I just couldn't  
21 afford to fly out there.

22 JUDGE CHACKIN: Well, I understand that.  
23 But I'm just -- you should be aware that you have to  
24 file with the Commission and take whatever steps  
25 necessary.

1 MR. FITZGIBBON: Your Honor?

2 JUDGE CHACHKIN: Yes.

3 MR. FITZGIBBON: I called the court reporter  
4 when Ms. McElwaine's first deposition wasn't received  
5 at the Secretary's office when expected and the  
6 reporting company was totally unaware of this  
7 requirement or the rule. It clearly places this  
8 requirement on the officer who presides at the  
9 deposition. And the reporting company referred me to  
10 Mr. Barab's office.

11 And I didn't get to speak to Mr. Barab, but I  
12 spoke to his secretary. His secretary told me that  
13 Mr. Barab intended to make copies of the deposition and  
14 to send the original and two copies directly from  
15 Mr. Barab's office. I told Mr. Barab's secretary that  
16 the requirement of the rules is that the officer who  
17 presided at the deposition, in this case the court  
18 reporter, send the -- or file the original two copies  
19 with the Commission Secretary. And I have not heard  
20 back from Mr. Barab yet about this. And yesterday  
21 afternoon I informed Mr. Lyon that we'd bring this up.

22 JUDGE CHACHKIN: All right. Mr. Lyon, that's  
23 what the rules require that the one who took the  
24 deposition is the one who files it with the Commission.

25 MR. LYON: I understand. I will attempt to

1       see that that's done.

2               JUDGE CHACHKIN:   Okay.

3               MR. MALINEN:   Your Honor, the Bureau would  
4       hope that they're filed in time to be of some use also.

5               JUDGE CHACHKIN:   Well, let's hope they are.  
6       If not, we'll have to deal with the problem of the  
7       witness here on the stand.

8               MR. FITZGIBBON:   Yes.   We'd like them to be  
9       received promptly and sent by Express Mail.

10              MR. LYON:   I will -- I don't know that there  
11      is any requirement to send them Express Mail.

12              JUDGE CHACHKIN:   Well, there's no  
13      requirement, Mr. Lyon.

14              MR. LYON:   I can't make the reporter do that.

15              JUDGE CHACHKIN:   Except that if you don't  
16      file with the Commission you won't be able to use it  
17      for purpose of impeachment if you don't have it filed  
18      with the Commission.

19              MR. LYON:   I understand.

20              JUDGE CHACHKIN:   All right.

21              MR. LYON:   Again, the requirement to send it  
22      is the reporter's.   I can't make the reporter do that.  
23      If Mr. Fitzgibbon is suggesting that I should pay for  
24      the Express Mail, I don't have a problem with that.  
25      But if that's what you want, say it and I'll do it.

1                   MR. FITZGIBBON: Well, the reason that they  
2                   should be sent by Express Mail is because they were not  
3                   sent promptly as required by the rule.

4                   MR. LYON: Apparently the witnesses haven't  
5                   signed them.

6                   MR. FITZGIBBON: No, Ms. McElwaine has signed  
7                   her first deposition. She did so in late August. It  
8                   should have been sent two weeks ago.

9                   MR. LYON: I understand. But you understand  
10                  I didn't make the arrangements for it.

11                  JUDGE CHACHKIN: Well, in any event,  
12                  Mr. Lyon, it's your responsibility to make sure that  
13                  these depositions are filed with the Commission.

14                  MR. LYON: And I will do that, Your Honor.

15                  JUDGE CHACHKIN: All right. We're talking  
16                  about the depositions of who, McElwaine and Morse, and  
17                  who else?

18                  MR. FITZGIBBON: Mr. Maia.

19                  JUDGE CHACHKIN: Those three? All right.

20                  Anything else the parties want to raise at  
21                  this time?

22                  MR. MALINEN: No, that is fine with regard to  
23                  the depositions and the fees.

24                  JUDGE CHACHKIN: I did bring up the question  
25                  of their argument that the tape -- the taking of the

1 tape was a violation of the California Criminal  
2 Statute.

3 MR. MALINEN: Well, if you'd like me to go  
4 straight away to that, I'll use the same method if  
5 we're agreeable. I'll simply tick off the arguments  
6 that we've come up with in a short time.

7 JUDGE CHACKIN: Well, why don't you just do  
8 it briefly and we can take it up more extensively on  
9 Wednesday.

10 MR. MALINEN: All right. The Bureau views  
11 this request as one for an attempted reenactment, an  
12 experiment really. And we see two problems primarily  
13 with it. One, a technical nature and the second one  
14 going to the credibility of Mr. Pascal.

15 Here we have Mr. Pascal presumably attempting  
16 to recreate the exam conditions and Ms. McElwaine and  
17 Mr. Ramsey taking notes and a comparison later of what  
18 the two have come up with and an evaluation of the  
19 results.

20 Is that a fair statement? If you wish to  
21 elaborate on what you were intending --

22 MR. LYON: I thought we were talking about  
23 the tape. If you want to talk about my request that we  
24 conduct a demonstration to test your witnesses to see,  
25 for example, if Ms. McElwaine is competent -- can take

1 notes of everything that's said and if Mr. Ramsey can  
2 appropriately evaluate them for the Judge to firsthand  
3 take a look at Mr. Pascal's what I have been told is an  
4 extraordinarily gifted teaching style, I'm certainly  
5 willing to discuss this. But I thought we were talking  
6 about the memorandum that was filed regarding the tape  
7 of the September 14th session.

8 MR. MALINEN: I apologize, Your Honor. I  
9 went into the next portion of the document I thought we  
10 were on. We started with the document here --

11 MR. LYON: I think you may have --

12 MR. MALINEN: The objection to admission of  
13 testimony from Christine McElwaine and I made the first  
14 argument --

15 JUDGE CHACHKIN: No, no, we're not dealing  
16 with that now.

17 MR. MALINEN: I was now making the second.

18 JUDGE CHACHKIN: I was dealing -- the only  
19 thing I was raising is their argument that the taping  
20 of the September 14th, 1991, testing session should be  
21 suppressed as a violation of California law. But we  
22 could take that up on Wednesday if you're not prepared  
23 to discuss it now.

24 MR. MALINEN: We will discuss it now.

25 JUDGE CHACHKIN: All right.

1                   MR. MALINEN: We do have a copy of the  
2 statute given us of Mr. Lyon's materials. And what we  
3 have attempted to do is through that make a rebuttal  
4 argument to his objection. We note that a ruling on  
5 this isn't required immediately. The first point in  
6 this statute, California Statute Section 632, taken  
7 from Crimes and Punishment, currently criminal  
8 statute --

9                   MR. FITZGIBBON: California Penal Code.

10                  MR. MALINEN: California Penal Code. At  
11 Section C discusses confidential communications. It  
12 gives a definition of that. The rule says that the  
13 communication must be carried on in circumstances  
14 reasonably indicating that if a party of communication  
15 desires it to be confined to the parties; that is, it's  
16 not simply one's desire at the time or after the fact.  
17 It's the circumstances indicating that desire that  
18 controls here.

19                  So to take the statute head on, our first  
20 point here is that in this instance the circumstances  
21 at issue showed no reasonable expectation of privacy.  
22 In this context, we'd point out that Chris McElwaine  
23 reported this on her own initiative. And she had this  
24 tape recording device in plain view and, in fact, had,  
25 I believe, head phones on.



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21 at issue showed no reasonable expectation of privacy.  
22 In this context, we'd point out that Chris McElwaine  
23 reported this on her own initiative. And she had this  
24 tape recording device in plain view and, in fact, had,  
25 I believe, head phones on.

1                   Now, while it could be thought that she was  
2                   using that tape recording device for some other  
3                   purpose, nonetheless the fact that a tape recording  
4                   device fully capable of taping is in plain view of  
5                   people at the session would seem to indicate to there  
6                   -- it would seem to us to indicate that there should be  
7                   less of a expectation of privacy on the part of those  
8                   gathered.

9                   Even though this doesn't rise to the level of  
10                  a public gathering, it need not rise to a level of  
11                  public gathering as Mr. Lyon argues. The statute  
12                  doesn't say that we simply have one instance where it's  
13                  confidential and the other one is public gatherings.  
14                  So we would say here again the circumstances control.  
15                  The circumstances in this instance are such that a  
16                  reasonable person would not have an expectation of  
17                  privacy. We also note that there were approximately 30  
18                  people at this session.

19                 The next point we would note is Section D  
20                 reads, "Except as proof in an action of prosecution or  
21                 violation, no evidence obtained as a result of  
22                 eavesdropping upon or recording confidential in  
23                 violation of the section shall be admissible in any  
24                 judicial, administrative, legislative, or other  
25                 proceeding.

1                   We would question whether this California  
2                   statute would preclude use of this information gleaned  
3                   which we style a communication rather than confidential  
4                   communication, any Federal administrative proceeding.  
5                   We note we haven't had a tremendous amount of time to  
6                   brief this. There could well, in fact, be cases  
7                   underlying this section that we're unaware of. But the  
8                   plain reading of it raises doubts to its applicability.  
9                   Also we note that the respondents have had this tape  
10                  recording since the 14th of July and are now raising  
11                  this argument for the first time.

12                 JUDGE CHACHKIN: All right.

13                 MR. LYON: Your Honor, if I may briefly  
14                  respond.

15                 JUDGE CHACHKIN: Yes.

16                 MR. LYON: I didn't have to put this on paper  
17                  and give the Bureau advance notice of the argument. So  
18                  if they're suggesting I'm late, I didn't have an  
19                  opportunity to -- I really don't have an opportunity to  
20                  object to this until Wednesday. I attempted to put it  
21                  on paper because I think these are important arguments.  
22                  They ought to be fully briefed.

23                 I should not go in and hit the Bureau with  
24                  them without giving them a chance to respond, and so I  
25                  attempted to do so. So I don't think Mr. Malinen's

1 comment is appropriate that this is -- that I've had  
2 the tape since the 14th of July and haven't done  
3 anything about it. There's been no procedure to do  
4 anything about it until it was offered, and the  
5 Bureau's a very, very excerpted and I would suggest a  
6 misleading excerpted portion of the tape was provided  
7 in the Bureau's case.

8 With respect to the question of the  
9 confidentiality of the communications, I think  
10 Mr. Malinen is right on point that the question of  
11 whether other people are present is not -- or whether  
12 it's a public gathering is not determinative. It's  
13 given the facts and circumstances. This was a test, a  
14 licensing test. People were not able to walk in and  
15 out willy-nilly and, in fact, I believe either the  
16 requirements of the testing manual from WY5I or else  
17 perhaps even the Commission requirements generally  
18 require that people not be able to walk in and out in  
19 these sessions.

20 Going on to the question of Ms. McElwaine's  
21 testimony, Mr. Malinen raised a point --

22 JUDGE CHACHKIN: Well, what about her  
23 statement that she was wearing -- she had the tape  
24 recorder in plain view?

25 MR. LYON: Well, I'm glad you raised that,

1 Your Honor. I think her deposition testimony and,  
2 fortunately, because I had not yet received the second  
3 day of her deposition testimony, I don't have this in  
4 front of me. I do have some of her testimony on it  
5 that was faxed to me late last night.

6 My understanding was that she testified that  
7 she had the earphones on so it would appear that she  
8 was listening to Morse Code tapes which apparently is  
9 very common. And hence that was designed to mislead  
10 the people present so they wouldn't believe that she  
11 was taping. I also understand that she had the  
12 recorder in her purse with her purse open so it wasn't  
13 like it was on the table.

14 Now, again, I'm saying what I've heard and  
15 not what I've actually read. Perhaps counsel who were  
16 present during her deposition can clarify that or who  
17 were present by speaker phone can clarify that. So I  
18 think the fact that she had the ear phones on rather  
19 than indicating that she was taping, indicated instead  
20 that she was listening. And, again, in preparation for  
21 a Morse Code examination, it's my understanding that  
22 that's very common.

23 JUDGE CHACHKIN: But if she's a participant  
24 to this meeting and she's not precluded from taking  
25 notes, what's the difference between that and making a

1 tape of what transpires?

2 MR. LYON: I think --

3 JUDGE CHACHKIN: It's not a confidential  
4 communication if she can make notes at what took place  
5 and divulge it. You're not denying that she has a  
6 right to make notes and divulge it?

7 MR. LYON: I'm not denying that she has the  
8 right to makes notes and divulge them. But there is no  
9 statute in California that prohibits that. What the  
10 statute in California prohibits is a surreptitious  
11 recording.

12 JUDGE CHACHKIN: But the question is, is it  
13 confidential -- do we have circumstances here  
14 indicating that the parties had a right to believe that  
15 this was a confidential communication in a situation  
16 where parties are free to make notes of what was  
17 transpiring. And I assume if someone takes shorthand,  
18 they could take it down verbatim.

19 MR. LYON: That may be true, Your Honor. I  
20 guess the difference is that it would be one thing to  
21 record the class, although I think generally the law is  
22 that a student doesn't have a right to record the class  
23 of a teacher without the teacher's permission. But  
24 this wasn't even taking notes in a class, this was  
25 apparently the test session itself. So apparently

1       there is a difference between -- I'm not sure that she  
2       would have had the right to take notes of what occurred  
3       during the test.

4               But, again, the statute isn't addressed to  
5       taking notes and divulging them, it's addressed to the  
6       surreptitious recording. And I think the statute  
7       speaks to the legitimate privacy concerns that people  
8       have and the California Legislature believes should be  
9       had by people in that State that their voice is -- and  
10      what they say is a higher privacy interest than  
11      someone's memory of what they said or someone's notes  
12      of what are said. And I think that's the evil that the  
13      California Legislature to reach is the obnoxiousness  
14      and the invasion of privacy that surreptitious  
15      recording.

16             JUDGE CHACHKIN: But what difference does it  
17      make -- are you saying that if a college student in  
18      California goes to class and uses a tape recorder or  
19      records everything that transpired, that that  
20      constitutes a confidential communication which is  
21      subject to the criminal statute?

22             Now, this seems to me very much analogous to  
23      that. There were 30 people assembled there for this  
24      test session. Now, granted it may be that what  
25      Mr. Pascal -- what he provided, the instructions he

1 provided may be subject to copyright, rights, whatever  
2 he has. But it's hard to me to believe that that  
3 constitutes a confidential communication.

4 MR. LYON: Well, that's a factual --

5 JUDGE CHACHKIN: Unless you can come up with  
6 some case precedent where you have a facts situation  
7 similar to this and California has determined that that  
8 constitutes a confidential communication subject to the  
9 criminal statute.

10 MR. LYON: I will attempt to do that, Your  
11 Honor.

12 JUDGE CHACHKIN: All right.

13 MR. LYON: Again, I had to research this  
14 matter relatively quickly too. And I will attempt to  
15 meet your concerns about that.

16 JUDGE CHACHKIN: All right.

17 MR. LYON: I think also it may be appropriate  
18 to perhaps withhold your ruling pending some  
19 clarification of factual situation at the hearing.

20 JUDGE CHACHKIN: Well, even if she was, as I  
21 said, did it surreptitiously, the question is still  
22 whether this -- under these circumstances constitute a  
23 confidential communication, where 30 people are  
24 assembled in a room listening to instructions, whether  
25 that is what falls within the purview of a confidential



1 communication under the criminal statute.

2 MR. LYON: I agree with you, Your Honor, and  
3 that's what I will attempt to address on Wednesday.

4 JUDGE CHACHKIN: All right.

5 MR. LYON: If I can go back to the other  
6 points that Mr. Malinen raised with --

7 MR. FITZGIBBON: With regard to the tape?

8 MR. LYON: I'm sorry?

9 MR. FITZGIBBON: With regard to the tape?

10 MR. LYON: No.

11 MR. MALINEN: I have something to say on the  
12 tape before we're off that subject then.

13 MR. LYON: Oh, I wanted to go -- well, okay,  
14 go ahead.

15 MR. MALINEN: It will just take a moment  
16 then. Our position is 30 people and a tape recording  
17 device in plain view, militate against this position.  
18 And secondly, that Mr. Lyon should brief the issue of  
19 whether this State Statute in any event could preclude  
20 use of this evidence in a Federal Administrative  
21 hearing.

22 JUDGE CHACHKIN: Well, that's another point,  
23 but we may not even have to get to that if this is not  
24 a communication under the Statute.

25 MR. LYON: If I could raise the issue -- go

1 back to the issue of Ms. McElwaine's testimony. I  
2 agree with Mr. Malinen that the statute is addressed to  
3 the use of volunteers for the purpose of licensing and  
4 monitoring. What I did not discuss because I didn't  
5 see it as relevant is that the use of volunteers for  
6 licensing is the volunteer examination program.

7 So I don't see -- I see it as a very strained  
8 construction that the Commission can use the amateur  
9 auxiliary for the Field Operations Bureau for the  
10 purpose of conducting an investigation into a school  
11 and the license examinations that follow that.

12 The clear intent of the statute, if not the  
13 express intent of the statute, is that authorize the  
14 use of volunteer examiners in the volunteer examination  
15 program. I have to reject Mr. Malinen's suggestion  
16 that because this is a licensed revocation proceeding  
17 that the Commission has the authority to use volunteer  
18 investigators or whatever to go out and try to obtain  
19 evidence to be used in this type of proceeding.

20 And I think that the legislative history, and  
21 I will obtain from Mr. Malinen a copy of the conference  
22 report, I think the legislative history is going to  
23 bear me out on this point that the purpose of the  
24 amateur auxiliary was to monitor for improper  
25 transmissions and not to be sort of a wide ranging

1       auxiliary force to go out and bear out supposed  
2       violations of the act.

3               I would point out that in the Senate report  
4       that I quote the amateur auxiliary of the Field  
5       Operations Bureau for the purpose of conducting an  
6       investigation into a school and the license  
7       examinations that follow that.

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9       express intent of the statute, authorizes the use of  
10      volunteer examiners in the volunteer examination  
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20      bear me out on this point; that the purpose of the  
21      amateur auxiliary was to monitor for improper  
22      transmissions and not to be sort of a wide-ranging  
23      auxiliary force to go out and ferret out supposed  
24      violations of the Act.

25              I would point out that in the Senate report

1       that I quote, the Congress said the Commission's use of  
2       volunteer licensed amateurs to assist in detection,  
3       location and monitoring of illegal operators and  
4       interference phenomenon on the amateur band is the  
5       purpose of this provision, and that armed with  
6       information obtained from amateur volunteers, FCC  
7       personnel can proceed right to the source of the  
8       problems, monitor at the predicted times and gather  
9       evidence much faster than would otherwise be possible.

10               I think this provision indicates very clearly  
11       that it was not Congress' intent to use amateur  
12       operators to go out and be the investigators. They  
13       were to pinpoint the problems and then trained FCC  
14       personnel were to go and investigate.

15               I think that's very important here, Your  
16       Honor, because Ms. McElwaine is not a trained  
17       investigator, and if Mr. Malinen or Mr. Fitzgibbon had  
18       been the investigators here, I could have a lot more  
19       confidence that the evidence that was brought up was  
20       unbiased and that it was based on professional  
21       techniques and did not have a hint of bias. We don't  
22       have any guarantee of that, Your Honor.

23               JUDGE CHACKIN: Well, you're talking about  
24       the evidence and how it should be received. We're not  
25       talking about that. We're talking about simply whether

1           this violates the statute.

2                   MR. LYON: That's correct, Your Honor.

3                   JUDGE CHACHKIN: And that has nothing to do  
4 with whether she was experienced or unexperienced. It  
5 just has to do with whether the language of the statute  
6 bars the Bureau's use of Ms. McElwaine's testimony.

7                   MR. LYON: I agree with you to that point. I  
8 went off on that tangent because I feel somewhat  
9 strongly about it, and I think, while it's not  
10 necessarily stated, I think that that's probably one of  
11 the underlying policy reasons why Congress specifically  
12 prohibited the involvement of amateurs in enforcement  
13 operations.

14                   And I must disagree with Mr. Malinen's  
15 characterization that Ms. McElwaine's efforts were not  
16 an enforcement effort.

17                   JUDGE CHACHKIN: Well, I've heard the  
18 arguments of the parties, and the Bureau can, after  
19 they examine it and see the statute, Mr. Lyon, after  
20 you review the statute and if there is any precedent in  
21 this area -- there probably isn't.

22                   MR. LYON: There does not appear to be, Your  
23 Honor.

24                   JUDGE CHACHKIN: I'll make my ruling on  
25 Wednesday. So, the parties can think about this matter

1       some more. Do you have something further to say at  
2       this point?

3               MR. MALINEN: I could, Your Honor. Again, I  
4       know that Mr. Lyon is at a disadvantage not having the  
5       conference report but merely the Senate report, but I  
6       would point out the language we cited having to do with  
7       licensing and monitoring doesn't come from the VE  
8       section and so forth. It comes from the precise  
9       section at issue here using volunteers, uncompensated  
10      and so forth, not in the VE's but for what's called  
11      enforcement actions for use of the information that  
12      they may gather.

13             Secondly, when Mr. Lyon indicates enforcement  
14      efforts, we would be very careful in assessing the  
15      statute to distinguish between a general phrase,  
16      enforcement efforts, and the precise language,  
17      enforcement actions.

18             I won't go into that at this point. It get a  
19      bit complicated with the legislative history, but  
20      there's a distinction.

21             JUDGE CHACHKIN: You're going to provide the  
22      parties and me with a copy of the legislative history?

23             MR. MALINEN: Yes, sir.

24             JUDGE CHACHKIN: You have that? I'd like to  
25      see it.

1                   MR. MALINEN: Indeed, this is the conference  
2 report right here, and we'll make copies available to  
3 all.

4                   JUDGE CHACHKIN: All right. We'll have a  
5 further session on Wednesday then, so the parties can  
6 have marked for identification their various exhibits  
7 and I can make a ruling on any objections. Yes?

8                   MR. MALINEN: We have a point, one more point  
9 that I incorrectly swayed into earlier, and that's the  
10 reenactment and, in fact, the purpose of this  
11 conference formally and, in fact, as we understand it,  
12 to look at cross exam and to look at this issue of  
13 reenactment, and this follows from your order and  
14 subsequent phone calls among the parties. May we go  
15 into that?

16                  JUDGE CHACHKIN: Yes, go ahead.

17                  MR. MALINEN: Okay. As I began earlier with  
18 regard to this attempted reenactment, we have two  
19 primary concerns here. One is that such a reenactment  
20 creates technical problems and credibility problems.  
21 Perhaps for the sake of convenience and making sure we  
22 have everything straight, I would ask Mr. Lyon to  
23 describe rather than my trying to paraphrase just  
24 what -- who's going to say what, who's going to take  
25 which notes and so forth. Would that be okay, George?

1                   MR. LYON: Sure. Your Honor, as I think I  
2 mentioned in the telephone conversation between you and  
3 me and Mr. Fitzgibbon, I'm presented with a bit of a  
4 problem in this case because I have the Bureau  
5 submitting a witness who says these were my notes of  
6 the class session. Based on my notes, only X amount of  
7 the question pool for the technician or novice or both  
8 elements of the amateur licensing exam was covered, and  
9 then the Bureau buttressing that with the testimony of  
10 Mr. Ramsey as to the appropriate amount of time that  
11 would be necessary to teach a class, and a similar type  
12 of evaluation of Ms. McElwaine's notes.

13                   I have no way to prove that Ms. McElwaine's  
14 notes are comprehensive. I think that that may serve  
15 as a -- that will certainly be a grounds for my  
16 objection to her notes and to her testimony with  
17 respect to the notes.

18                   JUDGE CHACHKIN: Weren't there 29 other  
19 people there who were in the room? If they have  
20 differing recollections, couldn't they testify that  
21 these were not the only matters gone into?

22                   MR. LYON: That presents me the problem that  
23 I can't afford to bring them here, Your Honor, and if  
24 they are presenting testimony, I have the right to  
25 attack it.



1 JUDGE CHACHKIN: Do you have declarations  
2 from any other people, from any of these other  
3 individuals as to -- which they state this was not the  
4 full extent of the costs, lecture?

5 MR. LYON: What I have presented, Your Honor,  
6 are declarations from -- I've presented statements and  
7 declarations from various students and from VE's who  
8 were there, although, actually, I'm not sure whether  
9 the VE's were there for the test or for the classes  
10 themselves, who say that there was no cheating that  
11 went on and that they were not privy to the -- were not  
12 privy to the questions ahead of time.

13 In some cases, it's statements that were  
14 given to Mr. Fitzgibbon during the course of his  
15 investigation that I intend to ask for official notice  
16 of.

17 No, I have not presented statements from any  
18 of the other students who were there at the August 4 or  
19 August 24 sessions. I don't know that that would be  
20 probative because it's been over a year since it  
21 happened. I don't know that these people -- that it  
22 would be at all helpful to you or that these people  
23 would be able to testify as to that.

24 JUDGE CHACHKIN: I don't know. Maybe they  
25 took their own notes.